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QUESTIONS PRESENTED

1. Whether a prevailing party can invalidate a fee contract with his attorney on the ground that it obligates him to pay a fee greater than the amount taxed against the losing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

2. Whether this Court should set aside the findings of both courts below that the contingent fee contract in this case was reasonable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following were defendants in the district court at the time of the motion to intervene and were appellees in the court of appeals: Ronnie J. Skaggs and Carthel S. Roberson.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1725

JUAN FRANCISCO VENEGAS,
Petitioner.

v.

MICHAEL R. MITCHELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 867 F.2d at 527. The memorandum decision of the district court (Pet. App. A18-A31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989. A petition for rehearing was denied on April 4, 1989. The petition for a writ of certiorari was filed on April 24, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, as codified in part of 42 U.S.C. § 1988, provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case arises out of a civil rights action brought by petitioner in the United States District Court for the Central District of California. Petitioner, represented at trial by respondent and co-counsel, obtained a judgment of more than $2 million in damages against certain police officers under 42 U.S.C. § 1983 for denial of his right to a fair trial. On application for a statutory award of attorney's fees against defendants pursuant to 42 U.S.C. § 1988, the district court awarded petitioner $117,000, of which $75,000 was based on respondent's services. Petitioner has not paid any of this sum to respondent.

After the substitution of other counsel for petitioner, respondent moved for leave to intervene in the district court to confirm a lien on the judgment for $406,000, the amount owed by petitioner pursuant to the contract signed by petitioner and respondent at the outset of the representation. The district court denied the intervention motion, but ruled that the contingent fee contract was reasonable and that respondent was not limited to recovering the amount awarded pursuant to section 1988. The court of appeals held that respondent should have been granted permissive intervention. The court of appeals affirmed the district court's determinations that the contract was reasonable and that respondent's entitlement to fees was not limited to the award under section

1988. Petitioner sought certiorari on the ground that there is a conflict in the circuits on the issue of the interpretation of section 1988. This Court granted the petition.

A. Statement Of Facts

1. *Petitioner's civil rights complaint*

In December 1971, petitioner, Juan Francisco Venegas, was arrested by police officers of the City of Long Beach, California, and charged with murder. He was convicted following a jury trial in July 1972, and sentenced to life imprisonment. In September 1974, the California Supreme Court reversed his conviction on the ground of insufficient evidence, and petitioner was released from custody in October 1974. *People* v. *Reyes*, 12 Cal. 3d 486, 526 P.2d 225, 116 Cal. Rptr. 217 (1974). *See Venegas* v. *Wagner*, 831 F.2d 1514, 1515-1516 (9th Cir. 1987).

Petitioner filed his civil rights complaint against individual members of the Long Beach police department in October 1977.[1] The complaint alleged that defendants had violated 42 U.S.C. § 1983 by conspiring to deny petitioner a fair trial through the knowing presentation of perjured testimony. The district court entered summary judgment in favor of defendants on the ground that the action was barred by the statute of limitations. That judgment was reversed on appeal, and the case was remanded for trial in 1983. *See Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

2. *Respondent's representation of petitioner*

In September 1985, petitioner retained respondent, Michael R. Mitchell, an experienced civil rights attorney.[2]

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[1] *See* R. 1, E.R. 1-16. The record is cited by reference to the entry number in the district court docket sheet, with a parallel citation to the Excerpt of Record prepared for use in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The docket sheet is reproduced at E.R. 230-242.

[2] Respondent has represented plaintiffs in numerous civil rights cases, including *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *See* R. 236, E.R. 69-75. Respondent also was a longstanding mem-

Petitioner and respondent entered into a written contingent retainer contract dated September 18, 1985, which provided that respondent would represent petitioner at trial for a fee of forty percent of any recovery, less a retainer of $10,000 (Br. in Opp. App. A2). The agreement further provided that respondent would apply to the court for attorney's fees and that any award of fees would be applied, "dollar-for-dollar," to offset petitioner's obligation to pay the contingent fee (*id.* at A3).[3] Finally, the agreement stated that it "covers one trial only" and that it did not apply to any further representation "[i]n the event there is a mistrial or an appeal" (*id.* at A1). With petitioner's consent, respondent later obtained the services of Johnnie L. Cochran, Jr., as co-counsel, who would share any contingent fee equally with respondent. *See* Pet. App. A5-A6.

At the time petitioner retained respondent, the trial was scheduled to be held in less than two months.[4] Respondent began preparations and filed a trial brief and other submissions prior to trial, which ultimately was held before Judge Kelleher over the course of two weeks

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ber and Chairman of the California State Bar Committee on Professional Responsibility and Conduct (*id.*), and was Special Counsel to the U.S. House of Representatives Committee on Standards of Official Conduct. *See* H.R. Rep. No. 46, 100th Cong., 1st Sess. II, 2 (1987).

[3] Consistent with the law then prevailing in the Ninth Circuit, the agreement also provided that the right to attorney's fees belonged to the attorney and would not be waived by the client (Br. in Opp. App. A3). This Court's decision in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), which reversed a judgment of the Ninth Circuit, was not announced until seven months after the fee agreement was signed and two months after the trial in this case.

[4] *See* R. 167, E.R. 237. Petitioner had been represented initially by the lawyer who had handled his earlier state court damage case, and subsequently by another firm before he engaged respondent.

in February 1986.[5] As the court of appeals later noted, the case "turned on the resolution of a 'difficult question of credibility.'" Pet. App. A17, *quoting Venegas* v. *Wagner*, *supra*, 831 F.2d at 1519. The jury returned a verdict in favor of petitioner for $2.12 million, which was reduced on post-trial motions to $2.08 million. Under the contingent fee contract, respondent was entitled to a fee of $406,000. *See* Pet. App. A6, A18.[6]

The damages award obtained for petitioner through respondent's efforts was more than twice the verdict entered in an earlier state court action for false arrest, in which petitioner was represented by other counsel.[7] While the evidence of damages was essentially the same in both cases, trying the federal cause of action for denial of petitioner's right to a fair trial represented "a more formidable task than establishing false arrest." *Venegas* v. *Wagner*, *supra*, 704 F.2d at 1146 n.1. Thus, respond-

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[5] *See* R. 236, E.R. 63-65. Petitioner's contention (Br. 11) that respondent did little work on the case is without foundation. Respondent was required to expend more than 200 hours in preparing and trying the case (R. 236, at 6, E.R. 53; R. 242, at 5, E.R. 133). Discovery was not pursued because the deadline had passed long before respondent was retained; respondent's inability to conduct discovery made the case more difficult, not less. Petitioner's misleading assertion that respondent did not file any "pleadings" is true only because of the technical definition of the term (*see* Fed. R. Civ. P. 7(a)). Contrary to the impression petitioner would leave, however, respondent made numerous court filings, including the trial brief, request for voir dire, request for jury instructions, witness and exhibit lists, and opposition to defendants' motion for judgment notwithstanding the verdict. *See* R. 175, 176, 179, 181, 184, 187, 210, 211, E.R. 238-239. No Rule 7(a) pleadings had been filed by either side since the answer in 1978 (R. 13, E.R. 231).

[6] Respondent's fee represents 20% of $2.08 million (since respondent shared the 40% fee equally with co-counsel), less the $10,000 retainer.

[7] The award of $1 million in that case was reversed on appeal in an unpublished decision. *Venegas* v. *City of Long Beach*, 2d Civ. No. 66285, Cal. App., Second Appellate District, Division Three (Oct. 31, 1983) (copy lodged with the Clerk of this Court).

ent faced a more difficult case in federal court, yet he achieved an award for petitioner that exceeded the state court verdict by more than $1 million.[8]

Pursuant to the fee contract, respondent prepared and filed for petitioner a motion for attorney's fees under section 1988.[9] Following a hearing, the district court awarded fees totalling $117,000, of which $75,000 was for work performed by respondent.[10] Judge Kelleher specifically noted respondent's "exceptionally competent performance" and "the excellent results obtained." [11]

Defendants appealed from the judgment-in-chief and from the award of attorney's fees. Petitioner appealed from the grant of judgment notwithstanding the verdict with respect to one defendant, which reduced the total damages award by $40,000. Respondent offered to represent petitioner on the appeal for a fee of 10 percent of the judgment. In connection with this offer, respondent advised petitioner to seek independent counsel to review the proposal, and he stated that he would be willing to consider a counter-proposal on the terms of the representation. Petitioner obtained such advice, rejected the offer without making a counter-proposal, and obtained new counsel for the appeal.[12]

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[8] Petitioner's argument (Br. 11) that the federal case did not present any risk of nonrecovery in light of the earlier state case ignores the different legal burdens presented by the different causes of action. It also ignores the finding of the court of appeals that there was no showing that the federal action "posed an unusually low risk for a civil rights case." Pet. App. A17. Finally, whatever the risk was, petitioner fails to account for the substantially greater relief obtained through respondent's efforts in the federal action. Even after deducting the contractual fee, petitioner will receive substantially more from the federal case than the jury had awarded in the state case.

[9] R. 236, E.R. 44-115.

[10] R. 242, E.R. 129-136; *see* Pet. App. A6, A18.

[11] R. 242, at 6, E.R. 134; *see* Pet. App. A28.

[12] *See* Pet. App. A29; R. 256, at 14, E.R. 191.

The court of appeals affirmed in all respects. *Venegas* v. *Wagner*, *supra*, 831 F.2d 1514. Petitioner and defendants subsequently entered into a satisfaction of judgment while the case was subject to possible further review.[13]

3. *The motion to intervene*

After other counsel had been substituted for petitioner on appeal, respondent moved for leave to intervene in the district court.[14] The purpose of the motion was to confirm a lien on the judgment to cover the attorney's fees owed by petitioner under the contingent fee contract. Petitioner did not oppose the motion, but argued that respondent's fee was limited to the amount awarded under section 1988.[15]

B. Decisions Below

1. *District court*

Following a hearing, the district court denied respondent's motion to intervene, but held that respondent was

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[13] *See* Satisfaction of Judgment in *Venegas* v. *Wagner*, No. CV 77-4047 RJK (C.D. Cal. filed Mar. 10, 1988) (copy lodged with the Clerk of this Court). Under the agreement, the City of Long Beach is making lump-sum and periodic payments to petitioner with a present value of approximately $2,000,000, plus a payment of $117,000 in attorney's fees awarded under section 1988 "for further distribution" (page 6). Petitioner has not, however, paid any of this sum to respondent. The satisfaction also provides that $800,000 of the total payment will be made into an escrow account, pending resolution of the dispute under the fee contract (page 5). As part of the agreement, petitioner waived punitive damages of $80,000 and accumulated interest of approximately $450,000 (pages 3-4).

[14] Petitioner asserts (Br. 6) that the motion was filed while respondent was still counsel of record. As the district court found, however, the motion was not filed until after respondent "signed a stipulation withdrawing as [petitioner's] counsel of record" (Pet. App. A18). Respondent thus did not file a motion on his own behalf until after the attorney-client relationship with petitioner had terminated.

[15] *See* Pet. App. A7, A18-A19; R. 254, 256, 260, E.R. 137-199.

entitled to the contingent fee established in his contract with petitioner. Pet. App. A18-A31.[16] Judge Kelleher found that respondent's "contingent fee does not constitute a windfall," since it compensates the attorney on a different basis from the calculation under section 1988 (*id.* at A28). Unlike the "lodestar" statutory fee award, "a 'reasonable' contingent fee does more than compensate an attorney for the time reasonably expended on a case. * * * [C]ontingent fee arrangements allow fee-indigent clients to obtain counsel to prosecute their civil rights claims while compensating the attorney for the risk of possible nonrecovery" (*id.*). The district court also noted that petitioner's "rights under section 1988 have not been affected in any way by the contingent fee contract," since that contract "expressly provides that any award of attorney's fees must be offset against [respondent's] contingent fee" (*id.* at A29).

The district court also determined that there was no other basis for invalidating the contract (Pet. App. A28-A29). In particular, the district court rejected petitioner's argument that respondent was obligated under the contract to prosecute the appeal without any additional fee. The district court concluded that the contract by its terms covered only the trial and not an appeal, and it noted that respondent advised petitioner to have independent counsel review his proposal to take the appeal for a fee of an additional ten percent of the judgment. As the district court concluded, "both [respondent] and [petitioner] acted within their rights," and there is "no reason to reduce or eliminate [respondent's] rights under the contingent fee agreement" (*id.* at A29).

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[16] The district court concluded that it had "jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its conduct of the principal litigation" (Pet. App. A29-A30). While the court declined to exercise that jurisdiction to the extent of confirming a lien, it did exercise its supervisory powers to review the propriety of the contingent fee contract. *See id.* at A27-A28, A30.

2. *Court of appeals*

On cross-appeals, the court of appeals reversed the district court's denial of the motion to intervene and affirmed the ruling that respondent was entitled to collect his full fee under the contract (Pet. App. A1-A17). With respect to intervention, the court of appeals did not hold that an attorney could intervene as of right in these circumstances, but only that the district court "abused its discretion when it denied [respondent] permissive intervention because it chose to address the merits of his contingency fee agreement" (*id.* at A11).

The court of appeals followed its decision in *Hamner* v. *Rios*, 769 F.2d 1404 (9th Cir. 1985), in holding that section 1988 "does not set a ceiling on an attorney's entitlement under a contingent fee contract," but that "a district court must [use its supervisory powers to] review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable" (Pet. App. A12 & n.6). The court of appeals reasoned that "limit[ing] attorneys' entitlements under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs," contrary to the basic purpose of section 1988 (*id.* at A13).

In addition, the court of appeals stated that there was a significant need for enforceable contingent fee contracts in view of the limitations on contingency adjustments to section 1988 awards established under this Court's decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). Pet. App. A14. This need was reinforced by the right of clients to waive section 1988 fees recognized in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986): "If courts must respect the freedom of clients and attorneys to agree that the attorney will receive no § 1988 fee in order to achieve a satisfactory § 1983 settlement, fairness requires that we respect the freedom of clients and attorneys to agree to a contingency fee in excess of a § 1988 award" (Pet. App.

A15). In sum, courts "should provide wide parameters to the negotiations between attorneys and their clients" (*id.*).

Finally, the court of appeals agreed with the district court that the contingency fee agreement in this case is reasonable (Pet. App. A16-A17). As the court of appeals noted, the "contingent fee is reasonable because it reflected the risk of nonrecovery" assumed by the attorney, and there was "no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases, or that [this] particular case posed an unusually low risk for a civil rights case" (*id.* at A17). The court of appeals therefore held that "a 40% contingent fee is reasonable in this case" (*id.*).

SUMMARY OF ARGUMENT

The primary issue in this case is whether a fee contract between lawyer and client is rendered invalid solely because it results in a fee greater than the amount taxed against the opposing party under 42 U.S.C. § 1988. Petitioner's argument that he is entitled to avoid paying the amount due under his contract with respondent is at odds with the language, legislative history, and policy of section 1988. It would be anomalous to read a statute intended to assist civil rights plaintiffs in obtaining representation instead as foreclosing their ability to retain counsel on a contingency or other contractual basis.

By its terms, section 1988 speaks only to the amount allowed to a prevailing party against a losing party, and not to the enforceability of a voluntary fee agreement between lawyer and client. When Congress has wanted to restrict attorneys to the amount awarded by the court, to preclude contingency contracts, or otherwise to regulate attorney-client fee agreements, it has done so expressly. Congress was aware of such laws when it considered section 1988 and enacted one of them at the same time that the civil rights fees statute was under debate.

Its choice not to include similar restrictions in section 1988 should not be overridden by judicial fiat.

The courts have been virtually unanimous in recognizing that section 1988 does not limit the fee that may be charged under a contingent fee contract. For example, in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), both the plurality and dissenting opinions accepted the premise that an adjustment in the statutory award for the risk in the particular case is unnecessary where a contingent fee contract exists, since the contract presents the attorney with "the prospect of compensation greater than the prospective lodestar amount." *Id.* at 749 (dissent); *see also id.* at 726 (plurality). Seven of the eight courts of appeals that have addressed the issue have agreed that contingency contracts can provide for fees greater than the statutory award against the losing party. The legislative history confirms that Congress did not intend to invalidate private fee agreements in these circumstances.

Maintaining the enforceability of these contracts is particularly important in view of the client's right to waive fees under *Evans* v. *Jeff D.*, 475 U.S. 717 (1986). While petitioner repeatedly suggests that lawyers should be satisfied with the fee award under section 1988, he ignores *Evans* and later cases holding that the statutory award belongs only to the client and that the attorney has no independent right to obtain fees pursuant to that provision. In fact, petitioner has never paid respondent the amount awarded by the court in this case under section 1988. Unless lawyers and clients are permitted to enter into binding fee agreements, lawyers can have no assurance of being paid for their labors, and civil rights plaintiffs will find it more difficult to obtain counsel—precisely the opposite of what Congress intended when it enacted the law.

Petitioner relies heavily on the argument that the "reasonable" fee awarded by the court under section 1988

renders any greater fee *per se* unreasonable. This argument ignores the different factors considered by the court in taxing an award at the end of the case against a losing party and those considered by a lawyer and client in voluntarily agreeing to a fee at the outset of representation. Moreover, the fact that a court must determine an amount to allow under section 1988 does not authorize it to intrude as a routine matter into the private contracts of lawyers and clients. Such contracts are entitled to respect and should be invalidated only when the fee exceeds what is permissible under the applicable ethical standards. Congress did not regulate legal ethics in section 1988, and the amount of a statutory award does not establish the outer boundary of an ethically proper fee.

Finally, petitioner argues that, even apart from section 1988, the fee contract in this case was unreasonable and should not be enforced. His arguments were rejected by both courts below, and there is no basis for this Court to disturb those findings. The contract was a written contingency agreement that appropriately compensated respondent for the work performed and the risk of loss. The terms of the contract comported in all respects with applicable state law and ethical rules. This Court should not permit petitioner to avoid paying the fee on which respondent relied in rendering services on his behalf, which resulted in a recovery by petitioner of well over $1 million, even after allowing for full payment of the agreed-upon legal fee.

ARGUMENT

I. SECTION 1988 DOES NOT INVALIDATE A LAWYER-CLIENT CONTRACT FOR THE PAYMENT OF FEES GREATER THAN THE AMOUNT TAXED AGAINST THE LOSING PARTY.

A. Section 1988 Does Not Regulate Fee Agreements Between Lawyers And Clients.

Petitioner invokes the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as a basis for invalidating his fee contract with respondent. Such an application of section 1988 would turn the statute on its head. Congress enacted the law in order to encourage citizens to vindicate their civil rights. Petitioner would instead impute to Congress an intent to overturn accepted private fee arrangements that provide incentives for attorneys to represent clients in cases that involve substantial damages claims. Neither the statutory language nor the legislative history supports such a reading, and it would have a significant adverse effect on the ability of civil rights plaintiffs to obtain representation.

1. *The statutory language does not apply to agreements between clients and their lawyers.*

Section 1988 provides simply that the court in a civil rights case "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Nothing in this provision speaks to voluntary fee arrangements between clients and their own lawyers. Rather, it provides only that an award may be involuntarily taxed against a losing party.

When Congress has intended to regulate attorney-client fee arrangements, it has done so expressly. For example, at the very time that it was debating Section 1988, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976. That Act allows attorney's fees in state *parens patriae* actions, but expressly limits

the circumstances under which private attorneys can be retained on a contingent fee basis to bring such suits. 15 U.S.C. §§ 15c(d)(1), 15g(1).[17]

More recently, in the National Childhood Vaccine Injury Act of 1986, Congress provided that an award of compensation under that statute shall include a reasonable attorney's fee. 42 U.S.C. § 300aa-15(e)(1)(A). The statute expressly states in addition that "[n]o attorney may charge any fee for services in connection with a [compensation] petition * * * which is in addition to [the amount awarded by the court]." 42 U.S.C. § 300aa-15(e)(3).

There are several other examples of statutory regulation of fee agreements.[18] Contingent fees are generally prohibited in government contracts. 41 U.S.C. § 254(a); 10 U.S.C. § 2306(b). In the Federal Tort Claims Act, Congress prohibited attorneys from charging a fee of more than 25 percent of the judgment. 28 U.S.C. § 2678.

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[17] *See* Pub. L. No. 94-435, 90 Stat. 1383 (Sept. 30, 1976). Under section 4G of the Clayton Act, as added by the Hart-Scott-Rodino Act, 15 U.S.C. § 15g(1), the definition of "State attorney general" entitled to bring a *parens patriae* action "does not include any person employed or retained" on "a contingency fee based on a percentage of the monetary relief awarded" or on "any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under [the fee-shifting provision]." Repeated references to this prohibition on contingency fees were made during the debate over section 1988. *See, e.g.*, 122 Cong. Rec. 31473, 31487, 31830, 31850 (1976) (remarks of Sen. Allen).

[18] Currently before the Court is the constitutionality of the attorney's fee provisions of the Black Lung Benefits Act and implementing regulations, which require judicial or administrative approval of attorney's fees and also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. § 725.365; 30 U.S.C. § 932(a); 33 U.S.C. § 928(c). *See United States Dep't of Labor* v. *Triplett*, No. 88-1671; *Committee on Legal Ethics* v. *Triplett*, No. 88-1688. The cases have been consolidated and are scheduled for argument on January 16, 1990.

Similarly, Congress formerly limited to $10 the fee that may be charged by an attorney in a veteran's benefits proceeding. *See Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). The law was amended in 1988 to limit fees to no more than 20 percent of the total award and to permit the Board of Veterans' Appeals to order reductions in fees that it finds excessive or unreasonable. 38 U.S.C. § 3404(c) and (d), as added by Pub. L. No. 100-687, 102 Stat. 4105, 4108 (Nov. 18, 1988). Many other laws directly regulating attorney's fees were cited and discussed in materials submitted during the 1975 House hearings leading up to the enactment of section 1988.[19]

In short, when Congress wished to regulate private attorney-client fee arrangements, "it knew how to do so." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) (expert witness fees). There is no reason that Congress could not have done so in section 1988 as well, and the issue was raised during the debates on the law (*see* notes 17 and 19, *supra*), yet Congress included no such provision. This Court should not add a prohibition to section 1988 that Congress itself did not put in the statute. *See, e.g., Northbrook National Life Ins. Co.* v. *Brewer*, 58 U.S.L.W. 4003, 4005 (Nov. 7, 1989) (refusing "to assume that Congress intended anything more than it had stated in unambiguous terms," particularly where "Congress could easily have used language" to accomplish a result, yet did not do so).

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[19] *See Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 304-306 (1975) (ABA report) [*House Hearings*]. In fact, members of the House considered during the hearings whether to "prohibit contingent fees" in the context of condemnation cases because there is not in those cases the risk of "collecting nothing" that is "the justification for the contingent fee." *Id.* at 116 (remarks of Rep. Pattison).

Thus, while the interpretation of section 1988 may be unclear with respect to some questions, this is not one of them. The statute addresses the allowance of fees against losing parties, not the fee agreements between lawyer and client. Several decisions of this Court are premised on precisely this understanding of the law. *See, e.g., Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (fee award not limited by prevailing party's contingent fee contract); *Blum* v. *Stenson*, 465 U.S. 886 (1984) (fee award not limited where prevailing party represented by organization that did not charge fees to clients). There is no basis for departing from that understanding here.

Eight Members of the Court have recognized that section 1988 does not preclude the payment of a contingent fee in an amount greater than the fee taxed against the losing party. In *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), both the plurality and the dissent agreed that enhancement of the statutory lodestar award for the risk of losing in the particular case is unnecessary when the attorney and prevailing party have a contingent fee contract that gives the attorney "the prospect of compensation greater than the prospective lodestar amount." *Id.* at 749 (Blackmun, J., dissenting); *see also id.* at 726 (contingency adjustment in lodestar unnecessary "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes," since the damages would be "sufficient to provide adequate compensation to counsel") (plurality op.).[20] It would be inconsistent with the premises underlying these *Delaware Valley* opinions for the Court now to hold

[20] *See also id.* at 720-721 n.6, where the Court cited *McKinnon* v. *Berwyn*, 750 F.2d 1383 (7th Cir. 1984), for the proposition that a contingency adjustment is not necessary "in cases where the attorney has entered into a contingent-fee contract with his client," since "the attorney is already being compensated for the risk of loss."

that contingent fee contracts are unenforceable to the extent that they exceed an award under section 1988.[21]

The lower courts are virtually unanimous that contingent fee contracts are not rendered invalid merely because the amount of the fee agreed to by the client is greater than the award taxed against a losing party under section 1988. *See Lewis* v. *Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986);[22] *Sullivan* v. *Crown Paper Board Co.*, 719 F.2d 667, 670 (3d Cir. 1983); *Kirchoff* v. *Flynn*, 786 F.2d 320, 323 n.4 (7th Cir. 1986); *Wilmington* v. *J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986); *Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *see also Sargeant* v. *Sharp*, 579 F.2d 645, 648 & n.4 (1st Cir. 1978); *Pharr* v. *Housing Authority*, 704 F.2d 1216 (11th Cir. 1983).[23] In their treatise on professional re-

[21] While *Delaware Valley* concerned attorney's fees under the Clean Air Act, the Court applied the principles governing awards under section 1988. *See* 483 U.S. at 713 n.1.

[22] In *Lewis* v. *Coughlin*, the Second Circuit clarified its statement in *Wheatley* v. *Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982), that a contingent fee contract is satisfied "to the extent counsel receives payment of the section 1988 statutory award." *Lewis* makes clear that the section 1988 award does not discharge the fee contract in its entirety. Rather, *Wheatley* stands only for the proposition that "to the degree that counsel obtains § 1988 payment, that amount should be offset against his claim for services provided under the contingency fee arrangement." 801 F.2d at 576. Moreover, the court in *Wheatley* could not have intended to hold that contingent fee contracts are limited to the amount of a section 1988 award, since the contingent fee recovery in that case ($10,000) was less, not more, than the section 1988 award ($29,742). Like the opinions in *Delaware Valley*, the court of appeals' decision in *Lewis* concludes that a contingent fee contract "is a strong factor militating against a bonus award [under section 1988] as the percentage arrangement in any such agreement takes into account the possibility of losing the case." *Id.*

[23] The only exception is *Cooper* v. *Singer*, 719 F.2d 1496 (10th Cir. 1983) (en banc), which is based on the erroneous pre-*Delaware Valley* view that it is appropriate to adjust the section 1988 lode-

sponsibility, Professors Hazard and Hodes also agree that "the statutory award simply augments plaintiffs' damages, and * * * the contingent fee agreement applies to the recovery according to the agreement's terms." 1 Hazard & Hodes, *The Law of Lawyering* 72.6-1 - 72.7 (Supp. 1989). This consensus of the courts and commentators is hardly surprising in view of the statutory language as well as the legislative history, which is discussed below.

2. *The legislative history confirms that Congress did not intend to invalidate private fee agreements.*

Congress enacted section 1988 to encourage persons to enforce their civil rights by ensuring that lawyers would be available to represent them in court. *See, e.g., Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 6 (1976) ["Senate Report"]; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976) ["House Report"]; Berger, "Court Awarded Attorneys' Fees: What Is 'Reasonable'?," 126 U. Pa. L. Rev. 281, 306 (1977). There is nothing in the legislative history suggesting that Congress, in the course of expanding the opportunities of plaintiffs to obtain representation, intended to restrict the means previously available for attracting counsel. The contingent fee contract provides a desirable

star by taking into account the risk of losing in the particular case. *See id.* at 1501 n.8, 1503 n.12. Subsequently, in the course of holding that *Cooper* applied prospectively only, the Tenth Circuit noted that *Cooper* was intended simply to prevent the windfall that would occur if an attorney were permitted to recover both the section 1988 award and the amount due under a contingent fee contract. *Sears* v. *Atchison, T. & S.F. Ry.*, 779 F.2d 1450, 1453 (10th Cir. 1985). That concern is inapplicable here, where the contract expressly provided that any fee awarded by the court would offset the client's obligation "dollar-for-dollar" (Br. in Opp. App. A3). Moreover, the court in *Sears* acknowledged that *Cooper* is "the *only* opinion holding that a fee shifting award" establishes the maximum allowable fee under a contingency contract and that "[o]ther circuit court opinions have held *contra* to *Cooper*." 779 F.2d at 1453, 1454 (emphasis in original).

additional incentive for counsel to take on meritorious litigation. *See* Leubsdorf, "The Contingency Factor in Attorney Fee Awards," 90 Yale L.J. 473, 495-496 (1981).[24] There is no basis for assuming that Congress intended, *sub silentio*, to abolish this incentive in a statute intended to promote the enforcement of civil rights laws. *See generally, e.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973) (courts should not " 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other' ") (citation omitted).

The legislative history characterizes section 1988 as a "limited and cautious" "first step" that "does not overturn [existing] law or practice." 122 Cong. Rec. 35126 (1976) (remarks of Rep. Kastenmeier).[25] Rather, Congress simply provided the express statutory authorization for fee-shifting that this Court had held was required in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *See* Senate Report, *supra*, at 1; House Report, *supra*, at 2. In enacting section 1988, Congress legislated against a backdrop of existing fee-shifting statutes that authorized attorneys and clients to enter into contingent fee contracts, as well as the existing ethical canons authorizing such contracts.[26] At no point in the

[24] At the same time, a contingent fee contract does not encourage frivolous cases, since the attorney is compensated only in the event of recovery. As Professor Leubsdorf observed, an attorney-client fee contract separate from the court fee award promotes informed litigation decisionmaking in light of all of the relevant costs and benefits. *See* 90 Yale L.J. at 507.

[25] Representative Kastenmeier was chairman of the subcommittee that held hearings on the fee-shifting bills leading to the enactment of section 1988.

[26] *See, e.g.*, 15 U.S.C. § 15 (Clayton Act); *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92, 111 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (if fee award under Clayton Act is less than amount in contingent fee contract, "the unsatisfied portion of the contingency fee could then be paid out of the award for damages"); 122 Cong. Rec. 32389

debates did anyone suggest that section 1988 would upset this settled law. To the contrary, section 1988 was intended to be consistent with existing law.[27] In response to a question from Representative Kastenmeier during the 1975 hearings on fee-shifting bills, Representative Seiberling, a leader in the drive for fee-shifting legislation, stated that the proposed legislation "certainly is not going to make attorneys' fees any less."[28] It would be inconsistent with this understanding to interpret section 1988 to reduce the fees that attorneys were previously entitled to collect under contracts with their clients.

In fact, Congress was not directly concerned with cases such as this one that could generate sufficiently large damages awards to provide for compensation to counsel. Rather, as Senator Tunney explained in introducing the bill, in "the typical case * * * there is often no damage claim from which an attorney could draw his fee." 121 Cong. Rec. 26806 (1975). The concern with cases for declaratory and injunctive relief and cases involving only

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(1976) (quoting law review article explaining that "[t]he great majority of plaintiffs' attorneys in antitrust suits have private fee arrangements with their clients" and that the court award "is merely a factor in these arrangements"); Model Code of Professional Responsibility, DR 2-106(B)(8).

[27] *See, e.g.*, Senate Report, *supra*, at 6; House Report, *supra*, at 5-9; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); *id.* at 35116 (remarks of Rep. Drinan, floor manager in the House); *id.* at 35117 (remarks of Rep. Railsback). In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court of appeals noted that a fixed or contingent fee contract may be for an amount greater than the fee award entered by a court. *Id.* at 718, *quoting Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd on opinion below*, 437 F.2d 959 (5th Cir. 1971). This Court has often observed that *Johnson* provides guidance with respect to Congress's intent in section 1988. *See, e.g., Hensley* v. *Eckerhart*, *supra*, 461 U.S. at 429-430, 434 n.9; *Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. at 943. *See also* Senate Report, *supra*, at 6; House Report, *supra*, at 8.

[28] *House Hearings*, *supra*, at 1, 49.

small damage claims is evident throughout the legislative history.[29] As Senator Kennedy concluded, often "civil rights cases * * * do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33314 (1976). *See also, e.g., City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality op.). Similarly, in the House hearings, Representative Seiberling made clear that the legislation "does not make much difference" in cases involving "a great monetary stake."[30]

Petitioner's reliance on the legislative history indicating that section 1988 will not provide a "windfall" for lawyers is misplaced. The payment of an otherwise permissible contingency fee is not a windfall but an accepted and ethically proper form of compensation. There is no double compensation, since any award under section 1988,

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[29] *See, e.g.*, Senate Report, *supra*, at 6 (civil rights "may be nonpecuniary in nature"); House Report, *supra*, at 9 (in most civil rights cases "only injunctive relief is sought," and immunity doctrines and other defenses "preclude or severely limit the damage remedy"); 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway); *id.* at 35118 (remarks of Rep. Seiberling); *id.* at 35126 (remarks of Rep. Kastenmeier).

[30] *House Hearings*, *supra*, at 50. The isolated statements in the legislative history relied on by petitioner to the effect that the bill would allow plaintiffs to recover their costs must be understood in the context of cases seeking injunctive relief or small amounts in damages. Providing adequate redress for plaintiffs in such cases was undoubtedly the chief concern underlying section 1988. By the same token, however, nothing in the legislative history suggests that fee-shifting was intended to excuse plaintiffs with large monetary claims from paying their attorneys an agreed-on fee out of the damages judgment. *Compare* H.R. Rep. No. 908, 99th Cong., 2d Sess., Part I, at 22 (1986) (under the vaccine compensation statute, "[n]o attorney may charge a fee for services in connection with a petition other than the amount" awarded by the court). In fact, the legislative history of section 1988 quotes a law review article stating that, in large damages cases, "a private fee arrangement with the client" may be "added to the court-awarded attorney's fees" to "assure[] adequate compensation for the attorney." 122 Cong. Rec. 32391 (1976).

to the extent made available to the attorney, is applied to offset the fee obligation under a contingency contract. The only person who benefits is the client. The windfall in this case would accrue to petitioner if the contract is invalidated, since he would then receive the benefit of the $2 million judgment that respondent achieved, without paying the fee that he had promised and on which respondent relied.

Petitioner thus would subvert Congress's intent to assist plaintiffs in obtaining representation by interpreting section 1988 to limit, rather than expand, the options of civil rights plaintiffs and their attorneys.[31] The legislative history confirms what is clear from the statutory language: Congress did not intend to invalidate private fee agreements when it gave prevailing parties the additional remedy of a fee recovery from losing parties.

Finally, petitioner's argument cannot be limited to contingent fee contracts in civil rights cases. His position also would lead to the invalidation of fixed retainers and hourly fee charges whenever those fees exceeded a statutory award.[32] Nor could this be confined only to civil rights litigation. Private fee contracts in many other settings where fee-shifting statutes are applicable, such as in antitrust cases and other commercial contexts, also would be nullified. There is no indication that Congress intended such an extraordinary limitation on the contractual rights of private parties.

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[31] Such an interpretation would be particularly ironic because the fee-shifting statute is intended to place civil rights plaintiffs on an equal footing with other litigants, not to deny them options available to others. *See, e.g., House Hearings, supra,* at 89-90 (submission of Ms. Derfner on behalf of the Lawyers' Committee for Civil Rights).

[32] In addition, lawyers for prevailing defendants presumably would be limited to the amount of any fee award under section 1988 in those cases where fees are taxed against the plaintiff because a lawsuit was frivolous or brought for an improper purpose. *See, e.g., Hensley* v. *Eckerhart, supra,* 461 U.S. at 429 n.2.

3. *Invalidating fee contracts would make it more difficult for clients to obtain representation in civil rights cases.*

A fundamental premise of petitioner's brief is that attorney-client fee contracts should be unenforceable because the attorney will be paid an award under section 1988. The precedents and facts of this case demonstrate that this premise is erroneous. The right to an award under section 1988 rests with and may be waived by the client. Any award that is entered is made to the client, not the attorney. Without an enforceable fee contract, the attorney is assured of nothing. In this very case, petitioner has not paid respondent any of the $75,000 awarded under section 1988 for his services.

Without some assurance of fees, the civil rights bar will simply be unable to represent plaintiffs in these actions. Plaintiffs with substantial monetary claims, who would have been able to obtain representation on a contingent fee basis before section 1988 was enacted, will find themselves worse off than before.

In *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), this Court held that the entitlement to a fee award under section 1988 rests with the prevailing party, not the attorney, and that the statute does not prohibit the prevailing party from waiving that entitlement. The lower courts have extended *Evans* from the class-action context in which it arose to individual actions as well. For example, in *Willard* v. *City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986), plaintiffs (represented by respondent) waived attorney's fees as part of a $10,000 settlement. The court of appeals held that the attorney was not entitled to intervene following the settlement or to apply on his own behalf for an award of fees under section 1988. *See also Panola Land Buying Ass'n* v. *Clark*, 844 F.2d 1506 (11th Cir. 1988) (Equal Access to Justice Act); *Soliman* v. *Ebasco Services Inc.*, 822 F.2d 320 (2d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (Title VII); Note, "Fee as the

Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since *Evans V. Jeff D.*," 102 Harv. L. Rev. 1278 (1989) ["Fee Waivers"]. The record in this case reflects the common practice of civil rights defendants to require fee waivers as a condition of settlement.[33] *See also Mitchell* v. *City of Los Angeles*, 741 F.2d 281 (9th Cir. 1984), *amended*, 753 F.2d 86 (9th Cir. 1985).

In the face of fee waivers, enforceable fee contracts offer attorneys their only assurance that civil rights representation will be economically feasible. *See* Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.9-72.10 ("it is perfectly proper for a lawyer to negotiate with a client in advance for a reasonable fee, to insist upon being paid that fee, and to let the client accept or reject the defendant's offer [to settle with a waiver of statutory fees] accordingly"); *Soliman*, *supra*, 822 F.2d at 322-323 (whether statutory awards "ultimately end up in the lawyer's or the client's hands depends, of course, on the private fee arrangements entered into between them when representation is undertaken"); Fee Waivers, *supra*, 102 Harv. L. Rev. at 1288 (waiver is implicit in lump sum settlement unless lawyer and client have contingent fee or retainer agreement).[34] To be sure, contingent fee arrangements have no application in many civil rights cases,

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[33] *See* R. 256, at 17-20, E.R. 194-197. *Evans* is, in effect, self-executing, and court approval of the waiver is not required outside of the class action context where settlements must be approved under Rule 23. When presented with a settlement offer including a fee waiver, a lawyer's ethical obligation is to advise the client to act in the client's best interests.

[34] This case does not present the question whether "civil rights attorneys can obtain agreements from their clients not to waive attorney's fees." *Evans* v. *Jeff D.*, *supra*, 475 U.S. at 766 (Brennan, J., dissenting). Rather, the issue is only whether a fee agreement (which provided also that fees would be sought under section 1988) is invalidated by section 1988.

where plaintiffs seek only declaratory and injunctive relief or small amounts in damages. That is no reason, however, to invalidate them in those cases where they can usefully be employed. It would be unreasonable to assume that Congress, in the course of addressing inadequacies in the representation of civil rights plaintiffs with small or no damages claims, would have made it more difficult for plaintiffs with larger claims to obtain representation.

B. The Amount Taxed Against A Losing Party Under Section 1988 Does Not Establish The Maximum Fee That A Lawyer May Ethically Charge A Client Under Their Contract.

Although there is no language in section 1988 directly regulating attorney-client fee agreements, petitioner argues that any fee greater than an award under section 1988 is *per se* unreasonable and may not be collected. This argument is without merit. A reasonable fee taxed against a losing party under section 1988 at the end of a case is based on different factors from those that a lawyer and client may voluntarily take into account at the outset of representation. As the Third Circuit has stated, "courts should be loathe to intrude into a contractual relationship between an attorney and client, and * * * a comparison between the contractual fee and the *Lindy* [lodestar] fee, whose method of calculation is designed to meet very different needs, is an inappropriate ground for invalidation of a contingent fee arrangement."[35] Similarly, Professors Hazard and Hodes state:

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[35] *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1112 (3d Cir. 1979). The *Lindy* fee is the lodestar amount established pursuant to *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and 540 F.2d 102 (3d Cir. 1976). While the lodestar calculation under section 1988 differs in some respects from the *Lindy* lodestar, the difference only confirms that the fee award under section 1988 is based on considerations that are not relevant to the fee agreement between lawyer and client. Under *Lindy*, a court could take into account the prelitiga-

> The lodestar * * * provides a formula for establishing the liability of the *defendant*, and is not a regulation of the reasonableness of the overall fee charged by the plaintiff's lawyer.
>
> * * * *
>
> [T[he term "reasonable" as used in Model Rule 1.5, or its predecessor DR 2-106, does not necessarily have the same meaning as it does in a statutory provision for awarding "reasonable" fees. When a court assesses a "reasonable fee" against the defendant and turns that amount over to the plaintiff, it is exercising an adjudicatory function, and must take into account a whole range of policies * * *. [T]he defendant is willy-nilly forced to "hire" the plaintiff's lawyer (after the fact) at roughly market rates * * *.
>
> In contrast, the term "reasonable" in Rule 1.5 * * * is invoked to determine whether the actual lawyer-client fee contract may properly be enforced.

Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.5, 72.7-72.8 (emphasis in original). *See also Boston & Maine Corp.* v. *Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894-895 (1st Cir. 1985) ("the lodestar * * * is not the sole benchmark for measuring the reasonableness of any and all attorney fees").

Section 1988 and attorney-client fee contracts have different purposes and are based on different considerations. In the first place, the statute measures a prevailing party's entitlement to recover from a losing party, rather than a voluntarily agreed-on entitlement of a lawyer to recover from his client. *See, e.g., Kirchoff* v. *Flynn*, 786 F.2d 320, 323 (7th Cir. 1986). Thus, for example, courts have held in antitrust cases that "[o]ne factor not conclusive [in determining the reasonableness of a contingent fee] is that the contingency fee agreement —formulated to satisfy needs other than those contemplated by 15 U.S.C. § 15—exceeds the section 15 award." *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, F.2d 1255, 1277-1278 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980). *Accord, Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61, 88, *later appeal*, 436 F.2d 699 (1st Cir. 1970).

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tion likelihood of success in the particular case. *See* 540 F.2d at 117. This is not permissible under section 1988, but it is relevant to the lawyer-client fee agreement.

Moreover, contingency calculations that are entirely permissible in fee contracts are sharply limited and of a very different nature in statutory fee awards. *See Delaware Valley*, *supra*, 483 U.S. 711. Contingent fee contracts, unlike statutory awards, take into account the risk of losing in the particular case, viewed at the outset of the representation. *See, e.g., Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866 (9th Cir.), *cert. denied*, 444 U.S. 981 (1979). Statutory awards are based on the time reasonably expanded on the case, viewed at its conclusion; any adjustment for contingency cannot take into account the *ex ante* risk in the particular case. *See id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). Statutory awards are not modeled on contingent fee contracts (*see Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. at 945), and there is accordingly no reason to assume that what is "reasonable" for one will be "reasonable" for the other. *See, e.g., City of Riverside* v. *Rivera*, *supra*, 477 U.S. at 574 (plurality op.); *id.* at 586 (Powell, J., concurring in the judgement); Leubsdorf, *supra*, 90 Yale L.J. at 481.

In sum, a fee-shifting statute does not involve "simply assigning a client's obligation for fees to others. * * * What constitutes a reasonable fee [award under the statute] may be more or less than the client is obligated to pay the attorney." Berger, *supra*, 126 U. Pa. L. Rev. at 282. *See also, e.g., Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974) (lawyer-client contract not decisive in determining fee award against defendant). This Court has reached the same conclusion in holding that a statutory award is appro-

priate even if the prevailing party's counsel did not charge a fee and that such an award can exceed the amount in the lawyer-client contract. *See Blum* v. *Stenson*, *supra*, 465 U.S. 886; *Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. 939.[36]

Wholly apart from these concerns, courts have held that it would be an "unwarranted interference with a private contract" to invalidate a voluntary agreement for a fee greater than the section 1988 award. *Wilmington* v. *J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986). *See also Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *Sargeant* v. *Sharp*, 579 F.2d 645, 648 (1st Cir. 1978). The attorney-client contract "represents their notion of what constitutes a reasonable fee." *Pharr* v. *Housing Authority*, 704 F.2d 1216, 1218 (11th Cir. 1983).[37] Such

[36] Petitioner relies on *Blanchard* to argue that, since the plaintiff can obtain a larger award pursuant to section 1988 than the fee agreed on in a contingency contract, the lawyer should not be able to collect a larger fee under the contract than is awarded under section 1988. This is a *non sequitur*. The point of *Blanchard* is that statutory awards and attorney-client fee contracts are independent, not that the contracts are unenforceable. There is no unfairness in holding a client to his contract, particularly since the right to statutory fees can be waived, which would otherwise leave the lawyer with nothing. *See* Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.5 (emphasis in original):

> Thus, if the court awarded fee is *lower* [than the contract fee], the plaintiff should *not* be able to force the lawyer to reduce the fee, but should be required to pay the difference. This is really *Blanchard v. Bergeron* in reverse: just as the contract cannot control the statutory award, the statutory fee is not a ceiling on a contingent fee agreement.

See also Dunn v. *H.K. Porter Co.*, *supra*, 602 F.2d at 1111 (it is not unfair to require a client to "honor[] the express terms of the fee agreement," but it would be unfair not to allow the attorney the fee that he bargained for and relied on in providing legal services to the client).

[37] *See* Hazard & Hodes, *supra*, *The Law of Lawyering*, at 72.7 (By enforcing contingent fee agreements for amounts greater than statutory awards, courts permit lawyers "to negotiate for sufficiently

a contract, "if freely made, is not lightly set aside." *Farmington Dowel*, *supra*, 421 F.2d at 90.[38] Petitioner's theory "would require invalidating contingent fee contracts as per se unreasonable whenever damage awards reach large amounts." *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1112 (3d Cir. 1979). *See generally Boston & Maine Corp.*, *supra*, 778 F.2d at 898 (refusing to invalidate allowance of fees in bankruptcy proceeding simply because the contingency fee "looks high *in hindsight*") (emphasis in original).[39]

For these reasons, a contingent fee contract is not rendered unenforceable merely because it exceeds an award under section 1988. Courts have the power to supervise contingent fees and to limit the amount received to what is permissible under the applicable rules of ethics. Thus, "if the court finds that an agreement

high percentages to protect themselves against the contingency of not prevailing. Since that contingency is what drove both the lawyer and client to proceed on a contingent fee basis in the first place, each should enjoy whatever benefits came from their bargain. If a court tries to superimpose its calculation of what is fair as between plaintiff and plaintiff's lawyer, it would undermine their allocation of risk."). This reasoning is particularly compelling in this case, where respondent, retained by petitioner on a contingency basis, obtained a much more favorable damage award in the federal trial than petitioner's earlier lawyers had been able to obtain in the state trial court.

[38] The Court has in other contexts also recognized that it should not lightly permit a party to a contract "to repudiate its solemn promise." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (enforcing contractual arbitration clause). *See also, e.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions").

[39] Even viewed *ex post*, it certainly is "reasonable" for petitioner to pay respondent the agreed-on fee, since his net recovery is still greater than the full amount of the damages awarded by the jury in the earlier state court action in which he was represented by other counsel.

provides for an unethically excessive fee, it may sparingly exercise its supervisory powers over the bar to limit the amount the attorney may actually receive." *Sargeant* v. *Sharp*, *supra*, 579 F.2d at 648.

The section 1988 award, however, does not establish the maximum ethically permissible fee—that is a question of local standards of professional ethics. *See generally Evans* v. *Jeff D.*, *supra*, 475 U.S. at 766 n.20 (Brennan, J., dissenting) ("Congress has not sought to regulate ethical concerns either in the Fees Act of elsewhere"); *Nix* v. *Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring in the judgment) (Court does not "enjoy any statutory grant of jurisdiction over legal ethics").[40] Accordingly, use of the courts' supervisory power to invalidate a contingent fee contract is "not a part of the normal process of awarding fees." *Sargeant* v. *Sharp*, *supra*, 579 F.2d at 648 n.4. Rather, that power should be exercised only in "exceptional circumstances" when the contractual fee is beyond "the outer limit of reasonableness." *Farmington Dowel*, *supra*, 421 F.2d at 90. *Accord*, *International Travel Arrangers*, *Inc.* v. *Western Airlines*, *Inc.*, *supra*, 623 F.2d at 1277-1278. As we show below, the fee in this case falls well within that limit.

[40] The Court should be particularly reluctant to displace state law in this area, since legal ethics has traditionally been a matter of pervasive state regulation. *See Bates* v. *State Bar*, 433 U.S. 350, 361 (1977). Section 1988 does not provide any indication of congressional intent to preempt state regulation of professional ethics, much less the clearly expressed statement of such intent that would be required. *See generally, e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

II. THERE IS NO BASIS FOR THIS COURT TO OVERTURN THE DETERMINATION BY BOTH COURTS BELOW THAT THE CONTINGENT FEE CONTRACT IN THIS CASE IS REASONABLE.

Petitioner argues that, as a factual matter, the contingent fee contract in this case was unreasonable even if section 1988 does not impose a *per se* limit on what may be recovered. This argument, which rests largely on state law, was rejected by both courts below. *See* Pet. App. A16-A17, A28-A29. There are no exceptional circumstances that would warrant this Court in overturning the concurrent findings of the district court and court of appeals. *See generally, e.g., Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500-2501 (1988); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Petitioner's contention that the 40 percent fee is "manifestly oppressive" (Br. 34) is erroneous. The court of appeals agreed with the district court that the fee "reflected the risk of nonrecovery." Pet. App. A17. The validity of contingent fees under California law is well-settled, and the contract in this case complied in all respects with that governing state law. *See* California Rules of Professional Conduct 4-200 and former rule 2-107; Cal. Bus. & Prof. Code § 6147(a)(3); 1 Witkin, *California Procedure*, "Attorneys," §§ 149 *et seq.* (3d ed. 1985). *See also Delaware Valley*, *supra*, 483 U.S. at 735-736 (Blackmun, J., dissenting) (describing professional consensus that contingency premium in private fee contracts is permissible).

The court of appeals observed in particular that petitioner had failed to present any evidence that a 40 percent fee "is not standard in California for civil rights cases." Pet. App. A17.[41] The district court agreed, concluding that "[respondent's] contingent fee does not constitute a windfall." *Id.* at A28. Similarly, the Long

[41] *See also* R. 260, at 12, E.R. 148 (declaration of respondent).

Beach City Attorney stated in opposition to the award of fees under section 1988 that contingent fee agreements "generally provide 25% to 40% of the award as compensation for the prevailing attorneys."[42] These conclusions are buttressed by other reported cases involving contingent fees of 40 percent and more in civil rights cases. *See, e.g., Hernandez* v. *Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139, 144 (5th Cir. 1988); *Elmore* v. *Shuler*, 787 F.2d 601 (D.C. Cir. 1986); *Sisco* v. *J.S. Alberici Constr. Co.*, 733 F.2d 55 (8th Cir. 1984); *Taylor* v. *Franklin Drapery Co.*, 443 F. Supp. 795 (W.D. Mo. 1978). *See also Phillips* v. *Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983) (40 percent fee for state law claims pendent to Title VII claim); *see generally, e.g., Novinger* v. *E.I. DuPont de Nemours & Co.*, 809 F.2d 212 (3d Cir.), *cert. denied*, 481 U.S. 1069 (1987) (40 percent fee in product liability action).

Similarly misguided is petitioner's argument that the contract should be set aside because respondent did not agree to handle the appeal without additional compensation. The written retainer agreement expressly provided that it was for "one trial only" and that there was no obligation to agree on further terms for representation "[i]n the event there is a mistrial or an appeal" (Br. in Opp. App. A1). The district court found no basis for disregarding the terms of the contract. *See* Pet. App. A29.[43] Respondent was accordingly well within his rights

[42] R. 238, at 4, E.R. 119.

[43] *Dalzell* v. *State Bar*, 6 Cal. 2d 433, 57 P.2d 1300 (1936), on which petitioner relies (Br. 37), has nothing to do with whether an attorney is obligated to represent his client on appeal notwithstanding the express terms of the retainer. "No appeal was taken" in that case (57 P.2d at 1301). Rather, the attorney in *Dalzell* "had charged and collected fees in excess of those authorized by the contract of employment and had failed over a period of years to account for the amounts collected or disbursements made by him on behalf of his clients and * * * had improperly appropriated a substantial portion of such collections to his own use in the guise of fees" (*id.* at 1302). Petitioner's reliance (Br. 35-36) on 1 Speiser, *Attorney's Fees* (1973), also is misplaced. The treatise makes clear that a retainer is deemed to include services on appeal without additional compensation only if it is silent on the matter. Here, in contrast, the contract expressly addresses the issue.

in proposing to take on the appeal for an additional ten percent of the judgment, and he took the extra step of asking petitioner to seek review of the proposal by independent counsel, which petitioner did.[44]

Since the contract covered only services at trial, petitioner's argument (Br. 37) that he "discharged" respondent is erroneous, and his reliance on *Fracasse* v. *Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972), is misplaced. The rule in *Fracasse*—that a discharged attorney can recover only the reasonable value of his services and not the amount in a contingent fee contract—has no application where, as here, the contract was fully performed. In fact, the court in *Fracasse* made clear that an attorney is entitled to his full contingent fee if he is discharged " 'on the courthouse steps' " and then "the client executes a settlement obtained after much work by the attorney." *Id.*, 494 P.2d at 14. Here, of course, the attorney-client relationship ceased *after* a favorable judgment was obtained, making the case for enforcement of the contract even stronger than what was contemplated in *Fracasse*.

There was no overreaching; to the contrary, a fee structure with escalating percentages in the event of appeal is a "common feature of contingent fee contracts." Wolfram, *Modern Legal Ethics* 532 (1986). Such fee agreements have often been reported and, in particular, have been enforced in California. *See, e.g., Lane* v. *Wilkins*, 229 Cal. App. 2d 315, 40 Cal. Rptr. 309 (1964) (contract provided for 33⅓ percent contingency at trial,

[44] Petitioner never responded to respondent's statement that he would entertain a counter-proposal concerning the terms of representation on appeal. *See* R. 256, at 14, E.R. 191.

40 percent on initial appeal, and 45 percent on appeal to state supreme court); *Hagge* v. *Bauer*, 827 F.2d 101, 111 (7th Cir. 1987) (40 percent at trial, 55 percent on appeal); *Kirchoff* v. *Flynn*, *supra*, 786 F.2d at 324 n.5 (40 percent at trial, 50 percent on appeal); *Sears* v. *Atchison, T. & S.F. Ry.*, 779 F.2d 1450, 1451 (10th Cir. 1985) (33⅓ percent at trial, 40 percent on appeal).; *Gaines* v. *Dixie Carriers, Inc.*, 434 F.2d 52, 53 (5th Cir. 1970) (40 percent at trial, 50 percent on appeal). Contracts providing for a 40 percent fee at trial and a 50 percent fee on appeal are within the typical range. *See* Wolfram, *supra*, at 532 n.44.

Petitioner also argues (Br. 38) that he was misled by the statement in the contract that the fee "is not set by law but is negotiable between Client and Attorney" (Br. in Opp. A2). That statement is required by California law. *See* Cal. Bus. & Prof. Code § 6147(a)(3). Petitioner's contention that the statement is incorrect begs the basic question presented in this case, i.e., whether section 1988 establishes the maximum fee that may be charged. If it does not, as the courts below held, then the statement is perfectly accurate. If it does, then the statement is irrelevant because petitioner will be excused from paying the contingent fee due under the contract.[45]

Finally, petitioner argues (Br. 37-38) that respondent should have informed him of the availability of an award under section 1988, relying primarily on *Denton* v. *Smith*, 101 Cal. App. 2d 841, 226 P.2d 723 (1951). The argument is ill-founded. Respondent accurately informed petitioner of the law pertaining to section 1988 as it then stood in the Ninth Circuit and of his own experience with respect to the availability of fees: that fees could be

[45] Whatever this Court holds, the statement in the agreement accurately reflected the law in the Ninth Circuit at the time of the contract. *Hamner* v. *Rios*, 769 F.2d 1404 (9th Cir. 1985), was decided before the agreement between petitioner and respondent was signed.

awarded under section 1988 but that respondent had never successfully collected them. As respondent stated, "I never told [petitioner] that any award of attorneys fees * * * never amounted to anything. I did tell him * * * that I had never successfully collected those fees."[46] *See also* *Willard* v. *City of Los Angeles*, *supra*, 803 F.2d 526; *Mitchell* v. *City of Los Angeles*, *supra*, 753 F.2d 86.

The state appellate court decision in *Denton* v. *Smith* is not on point. There, the contract for legal services failed for want of consideration because the lawyer did not explain to his client that he probably would be able to recover his interest in the probate matter "without requiring *any* legal services on [the lawyer's] part." 226 P.2d at 725 (emphasis added). Moreover, the parties in that case had an attorney-client relationship "for more than a month prior to" the date on which the contract was executed, yet the attorney did not suggest an "independent advisor" to review the contract (*id.*). Here, in contrast, there was ample consideration for the contract and there was no attorney-client relationship when it was executed. When the time came to discuss representation on appeal, respondent ensured that petitioner had the benefit of the independent counsel contemplated in *Denton*.

In view of respondent's experience with section 1988 fee waivers by his clients in other civil rights actions, he was unwilling to represent petitioner without the protection of a contingent fee contract that offered the prospect of an enforceable right to fees in the event of recovery.[47] The agreement nonetheless reflected the possibility of an award under section 1988 and protected petitioner by providing that any such award would be credited against

[46] R. 256, at 13, E.R. 190.

[47] Respondent's declaration details four cases in which his clients waived their right to fees under section 1988 as part of settlements, thereby eliminating his primary source of compensation for his substantial services that in each case led to the attainment of his clients' objectives. R. 256, at 17-20, E.R. 194-197.

the contingent fee (Br. in Opp. App. A3). In short, petitioner obtained counsel of his choice through the written retainer, respondent provided "exceptionally competent" [48] legal services in reliance on the fee stated in the contract, and petitioner received the benefits of those services in the form of a recovery more than twice that awarded at trial in the prior state proceeding.

For all these reasons, this Court should affirm the concurrent findings below that the contract was reasonable, and certainly not unfair to petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[48] R. 242, at 6, E.R. 134.